UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

SUSANNA MIRKIN and BORIS MIRKIN, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

No. 18 Civ. 2949 (ARR) (JAM)

v.

XOOM ENERGY, LLC and XOOM ENERGY NEW YORK, LLC,

Defendants.

DECLARATION OF MICHAEL D. MATTHEWS, JR. IN OPPOSITION TO PLAINTIFF'S MEMORANDUM OF LAW ON CONTINUED CLASS TREATMENT

Michael D. Matthews, Jr., under penalty of perjury, declares as follows:

I am a partner of the law firm McDowell Hetherington LLP, attorneys for Defendants XOOM Energy, LLC and XOOM Energy New York, LLC. I submit this Declaration in opposition to Plaintiff's memorandum of law as to whether or not classwide proceedings remain viable.

- 1. Annexed hereto as **Exhibit 1** is a true and correct copy of an email I received from Plaintiff's counsel on March 26, 2024 with an attached "Proposed Revised Pretrial Schedule Draft." It was through that attachment that XOOM first learned of Plaintiff's intent to submit a new expert report.
- 2. Annexed hereto as <u>Exhibit 2</u> is a true and correct copy of an email that XOOM's counsel sent to Plaintiff's counsel on March 26, 2024 following the parties' discussions regarding Plaintiff's "proposed supplemental report [that] would not only update the existing damage model to account for new data but also would include a new methodology and opinions not previously disclosed"

3. Annexed hereto as **Exhibit 3** is a true and correct copy of relevant excerpts from the November 8, 2022, deposition of Seabron Adamson.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 1, 2024.

Michael D. Matthews, Jr., Esq.

EXHIBIT 1

From: <u>Ethan Roman</u>

To: Diane Wizig; Matt Matthews; Netra Sreeprakash
Cc: Burkett McInturff; Steven Wittels; Andrey Belenky

 Subject:
 Mirkin v. XOOM - 3.26 Meet & Confer

 Date:
 Tuesday, March 26, 2024 9:04:13 AM

Attachments: <u>image001.png</u>

Mirkin v. Xoom - Proposed Revised Pretrial Schedule Draft 3.26.24.docx

Diane & Matt –

On today's meet and confer, we would like to discuss a revised schedule.

For Defendants' decertification motion, we are jammed up and would like one extra week to respond, moving the deadline to April 5. We are amenable to the same extension for Defendants' reply, moving that deadline to April 26.

For the pretrial schedule, analyzing Defendants' March 1 data production and preparing for last week's settlement conference took substantially more work than anticipated. We therefore would like to request that the Court extend the deadline to file the pretrial order to July 26. Both parties and the Court would benefit from building in that additional time to crystalize the parties' disputes and ensure there is enough time to complete everything required for the pretrial order. A proposed revised schedule for the parties to complete the various pretrial tasks is attached with the July 26 date in mind.

We can use the following dial-in for today's call:

Dial-in Number: (267) 930-4000; Participant Access: 094-032-726

Best, Fthan

Ethan D. Roman

WMP | Senior Associate 305 Broadway, 7th Floor | New York, NY 10007

Phone: 914 775 8862 x106



Mirkin et al v. XOOM Energy, LLC et al (EDNY 1:18-cv-02949-ARR-JAM) **Pretrial Schedule**

Date	Activity	
March 29 <u>April 5</u> , 2024	Both Parties Objections to witnesses Objections to deposition designations Deposition cross-designations Objections to exhibits Rebuttal exhibit list Motions in limine (including motions to strike and-Daubert-motions) Plaintiff Response to Decertification Motion	
	 Defendants Redline to jury instructions Response to jurisdiction statement 	
April <u>19</u> 5, 2024	Motions in limine (excluding expert-related motions)	
	Serve updated expert reportTrial Memorandum for parties to evaluate disagreements regarding governing law	•
April 26, 2024	Objections to deposition cross-designations Objections to rebuttal exhibit list	_/
	 Defendants Decertification Reply File Decertification Motion 	4/
April 12May 17, 2024	Both Parties Responses to motions in limine (including excluding expert-related motions to strike and Daubert-motions) Objections to deposition cross-designations Objections to rebuttal exhibit list	
May 24, 2024	Both Parties Deadline for any further expert depositions	•/
<u>June 7, 2024</u>	Both Parties Replies on MILs	•/

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June 28, 2024 Bot July 3, 2024 Bot April 17 July 12, 2024 Plai	th Parties Daubert and other expert-related MILs th Parties Trial memorandum for parties to evaluate disagreements regarding governing law th Parties Opposition to Daubert and other expert-related MILs intiff Draft of the Pretrial Order
June 28, 2024 Bot •	h Parties Trial memorandum for parties to evaluate disagreements regarding governing law h Parties Opposition to Daubert and other expert-related MILs intiff Draft of the Pretrial Order
July 3, 2024 Bot April 17 July 12, 2024 Plai	Trial memorandum for parties to evaluate disagreements regarding governing law th Parties Opposition to Daubert and other expert-related MILs intiff Draft of the Pretrial Order
July 3, 2024 Bot •	disagreements regarding governing law th Parties Opposition to Daubert and other expert-related MILs intiff Draft of the Pretrial Order
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April 17 July 12, 2024 Plai	Opposition to Daubert and other expert-related MILs intiff Draft of the Pretrial Order
April 17 July 12, 2024 Plai •	MILs intiff Draft of the Pretrial Order
April 17 July 12, 2024 Plai	intiff Draft of the Pretrial Order
•	Draft of the Pretrial Order
	endants
	Decertification Reply
•	File Decertification Motion
, .p = 2 <u>00.7 20</u> , 202 .	<u>fendants</u>
•	Revisions/additions to the Pretrial Order
April 24 July 23, 2024 Def	fendants -Both Parties (For filing with the Pretrial
Ord	ler):
•	Revisions to trial memorandum
•	Statement of damages claimed or other relief
	sought (if any)
April July 26, 2024 Plai	<u>intiff</u>
•	File the Pretrial Order
	th Parties
	Submit copies of respective exhibits to Court per
	Individual Rules
	Replies on <u>Daubert</u> and expert-related motions
	in limine (including motions to strike
	and-Daubert-motions)
	File motions in limine (including motions to strike
	and Daubert motions)

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EXHIBIT 2

From: <u>Diane Wizig</u>

To: Ethan Roman; Matt Matthews; Netra Sreeprakash
Cc: Burkett McInturff; Steven Wittels; Andrey Belenky
Subject: Re: Mirkin v. XOOM - 3.26 Meet & Confer
Date: Tuesday, March 26, 2024 2:41:35 PM

Attachments: <u>image001.png</u>

[MH 3.26] Mirkin v. Xoom - Pretrial Schedule - Final.docx

Ethan and Burkett,

Attached is a new draft schedule that gives you the requested courtesy extensions of an extra week for decertification briefing and a few additional weeks on the pretrial order deadlines. As discussed, however, we can't agree to your proposed supplemental expert report because it would not only update the existing damage model to account for new data but also would include a new methodology and opinions not previously disclosed, which would seriously prejudice XOOM at this late stage.

If this schedule looks acceptable to you, please put together a letter to the court for our review that seeks only the two extensions that need court approval: decertification briefing and the pretrial order. Or if you want to have a call to discuss, we are available to talk at 4 ET using the call-in number from earlier.

Thanks,

Diane S. Wizig

Partner

McDowell Hetherington LLP

P: 713-333-5889 F: 713-337-8850

CONFIDENTIALITY NOTICE

The information in this e-mail may be confidential and/or privileged. This e-mail is intended to be reviewed by only the individual or organization named above. If you are not the intended recipient or an authorized representative of the intended recipient, you are hereby notified that any review, dissemination or copying of this e-mail and its attachments, if any, or the information contained herein is prohibited. If you have received this e-mail in error, please immediately notify the sender by return e-mail and delete this e-mail from your system.

From: Ethan Roman <edr@wittelslaw.com>
Date: Tuesday, March 26, 2024 at 9:04 AM

To: Diane Wizig <diane.wizig@mhllp.com>, Matt Matthews <matt.matthews@mhllp.com>,

Netra Sreeprakash < netra.sreeprakash@mhllp.com >

Cc: Burkett McInturff <ibm@wittelslaw.com>, Steven Wittels <slw@wittelslaw.com>, Andrey

Belenky <abelenky@kblit.com>

Subject: Mirkin v. XOOM - 3.26 Meet & Confer

Diane & Matt –

On today's meet and confer, we would like to discuss a revised schedule.

For Defendants' decertification motion, we are jammed up and would like one extra week to respond, moving the deadline to April 5. We are amenable to the same extension for Defendants' reply, moving that deadline to April 26.

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We can use the following dial-in for today's call:

Dial-in Number: (267) 930-4000; Participant Access: 094-032-726

Best, Ethan

Ethan D. Roman

WMP | Senior Associate 305 Broadway, 7th Floor | New York, NY 10007

Phone: 914 775 8862 x106



EXHIBIT 3

Case 1:18-cv-02949-ARR-JAM Document 273 Filed 11/22/24 Page 11 of 14 PageID #: 13120

1	UNITED STATES DISTRICT COURT			
2	EASTERN DISTRICT OF NEW YORK			
3	SUSANNA MIRKIN and BORIS MIRKIN,			
4	Individually and on Behalf of All Others			
5	Similarly Situated,			
6	Plaintiffs,			
7	vs. No. 18 Civ. 2949(ARR) (RER)			
8	XOOM ENERGY, LLC and XOOM ENERGY			
9	NEW YORK, LLC,			
10	Defendants.			
11	x			
12				
13				
14	VIDEOTAPED DEPOSITION OF			
15	SEABRON ADAMSON			
16	Tuesday, November 8, 2022			
17	10:06 a.m.			
18	Veritext			
19	101 Arch Street			
20	Boston, Massachusetts 02110			
21				
22				
23				
24	Laurie K. Langer, RPR			
	Page 1			

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around their costs.

damages --

A. Yes.

A. Uh-huh.

contract language?

A. Uh-huh. Okay.

charged; correct?

paragraph 72?

- Q. And so I'm not at this point even arguing with
- you about it. I just want to understand it.
- 3 A. Uh-huh.
- 4 Q. You've said that under Model 1 --
- 5 A. Right.
- 6 Q. -- anything above, --
- 7 A. Uh-huh.
- 8 Q. -- anything charged by XOOM above the supply
- 9 costs reported in the rate setting workbook is a damage;
- right? 10
- 11 A. Yes.
- 12 Q. And that -- under that model --
- 13 A. Uh-huh.
- Q. -- for those customers who were charged variable
- 15 rates by XOOM over the relative time period, XOOM would
- 16 lose money --
- 17 MR. WITTELS: Objection.
- 18 Q. -- for those customers in that contract language?
- 19 MR. WITTELS: Asked and answered.
- 20 Objection.
- 21 A. Possibly. I don't think that's the question in
- 22 front of us. As I said, I mean, the question is
- consistency with the contractual language. 23
- 24 Q. Right.

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- 24
- know, just a kind of a crosscheck calculation to see if

total costs and the thing we just discussed; right?

Page 88

this information back that we made the calculation on

Model 1 in your opinion accurately measures the

Q. Let me see if I can go at it a different way.

Q. -- flowing from what you believe is XOOM's

failure to set variable rates consistent with the

Q. And let's see. Paragraph 72 to your report.

A. Just give me one second to flip to the page.

supply costs and the rate that the regulated utility

Q. Okay. What -- what does that calculate in

A. Well, the second sentence talks about XOOM's

As we -- as I indicate here we also did a, you

A. No. I don't think you said that right.

Q. Calculates the difference between XOOM's reported

MR. WITTELS: 72?

- A. You said -- as you said yourself, they provided 1
- their supply costs. What's the difference with supply 2
- 3 costs?
- 4 Q. I -- I don't know why this is difficult. Like,
- the calculation isn't even difficult. I'm bad at math
- and I can do this one. It's anything above the reported
- 7 supply cost is a damage under Model 1; --
- 8 A. Yes.
- 9 Q. -- correct?
- 10 A. Yes.
- 11 Q. Even if anything above that reported supply cost
- included certain fixed costs, that if they weren't
- reported in the rate setting workbooks it is a damage
- 14 under Model 1?
- 15 MR. WITTELS: Objection.
- 16 A. That is how the calculus -- that's how the
- 17 calculations go through, because that's how XOOM
- 18 reported its total costs, yes.
- 19 Q. And that is because your reading of the contract
- 20 is that XOOM can charge no more than the reported total
- 21 costs?
- 22 A. Since we went through this morning, it depends on
- 23 how you read supply costs. I read supply costs as, you
- know, costs directly related to supply. XOOM reported

- it's in the same, you know, in the same order of
- magnitude and just crosschecked it again to what XOOM 2
- 3 had reported the applicable utility rates to be. You
- 4 know, they're generally similar. So if you were to take
- the deltas, not against XOOM's total cost but against
- the utility rates, then you get 49 million, not 55
- 7 million.
- 8 Q. How is that different from what I asked?
- 9 A. You said, as I remember, this compares the, the
- total cost to the -- I'm not exactly sure what you said,
- but I think it had some consistency with that. If you
- 12 want to read it back.
- 13 Q. It's okay. The first sentence of 72 --
- 14
- 15 O. -- calculates the difference between XOOM's
- 16 reported supply costs --
- 17 A. Uh-huh.
- 18 Q. -- and the rate that the utility charged?
- 19 A. Yes.
- 20 Q. Okay. And the utility in New York is required to
- 21 be profit neutral; right?
- 22 A. Well, you -- the utilities in New York are
- 23 actually investor owned, most of them are investor owned
 - utilities, so they're not, they are not nonprofit

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- 1 rate that is consistent with the costs plus an
- 2 appropriate margin, but in this case your opinion that,
- 3 is that based on actual and estimated supply costs does
- 4 not allow for recovery of an appropriate margin?
- 5 A. Okay. Well, I mean, obviously those are two very
- 6 different wordings. Right? I mean, here we have a
- 7 very -- in this particular case, with the Mirkins, we
- 8 have this specific contractual language around supply
- 9 costs, which as I remember wasn't -- that actual and
- 10 estimated supply costs and the examples of direct supply
- 11 costs were not in that contractual language; correct?
- 12 As you just read out.
- Here we have this very specific contractual
- 14 language which, you know, as I said, my first, my first
- 15 reading of that is, you know, what it says, "specific
- 16 actual and estimated supply costs."
- So, you know, as we saw in the report, if the
- 18 Court were to find that that phrase should be
- 19 interpreted to mean having a margin, we, we produced the
- 20 second model with a margin. But, you know, that's
- 21 really kind of for the Court, in my mind, to determine.
- 22 You know, my first read is supply costs are pretty
- 23 narrowly defined as supply costs. It doesn't include
- 24 marketing costs, for example, that you mentioned. So, Page 94

- Q. Okay.
- 2 A. I don't mean construction in a legal sense, I
- 3 mean just the wording is different; right? I mean, the
- 4 pricing provisions are different.
- 5 Q. The words are not exactly the same, I will agree
- 6 with you on that.
- 7 A. Well, and in my mind the economic meaning of the
- 8 words is not the same. Clearly the words are not the
- 9 same. It's not the same words on the page on the left
- 10 and the right. But to me, I mean, I -- I interpret the
- 11 meaning of those to be somewhat different.
- 12 Q. I can tell.
- 13 A. Uh-huh.
- 14 Q. But neither one referenced margin or profit;
- 15 right?
- 16 A. No.
- 17 Q. Okay. All right. Model 2.
- 18 A. Okay.
- 19 Q. Let's look at where that begins.
- 20 A. Page 23.
- Q. So Model 2 in plain terms is like Model 1 except
- 22 that you also factored in the margin that XOOM charged
- 23 its fixed rate customers; right?
- A. Yeah, in broad terms, yes.

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- 1 you know, that's why Model 1 went with, went with supply
- 2 costs.
- 3 Q. Okay. In the contract language here, one of the
- 4 reasons that you have opined --
- 5 A. Uh-huh.
- 6 Q. -- that XOOM has constrained its --
- 7 A. Uh-huh.
- 8 Q. -- supply costs is that the contract language
- 9 doesn't reference margin; right?
- 10 A. Uh-huh.
- 11 Q. But the Richards --
- MR. WITTELS: You have to say -- you have to
- 13 say, "yes." You can't say, "uh-huh."
- 14 A. I'm sorry. I think, yes.
- 15 Q. But the Richards contract language, based on
- 16 business and market conditions, didn't reference margin
- 17 either; right?
- 18 A. No. But it also doesn't have the specific
- 19 construction here.
- 20 Q. Okay. Are -- are you now prepared to provide
- 21 contract interpretation?
- A. No. But I'm just saying it doesn't have the same
- 23 word. I mean, it doesn't -- it doesn't work the same
- 24 way.

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- 1 Q. Okay. And that's essentially the damage model
- 2 used in the Richards case; right?
- 3 MR. WITTELS: Objection.
- 4 A. I don't exactly remember how that one, that one
- 5 worked. That was maybe, like, seven or eight years ago.
- 6 But I'm -- so I'll -- I won't say I remember
- 7 specifically how the model worked there.
- 8 Q. Okay. You -- are you offering the opinion that
- 9 it's inappropriate for XOOM to seek a higher margin for
- 10 variable rates than it does for fixed rates?
- 11 A. That that -- the -- you know, with the assumption
- 12 of the margin, so, I mean, everything we're predicated
- 13 here is on the assumption of the applicability of the
- 14 margin under this specific contract. I -- we need a
- 15 reasonable margin to charge.
- We used the fixed rate margin as, you know,
- 17 indicative of a rate that, a margin that XOOM itself had
- 18 charged in the same months, in the same periods, blah,
- 19 blah, blah, all being equal, and as, as an indicator of
- 20 what a reasonable margin might be.
- Q. Okay. And are you offering an opinion in this
- 22 case that it would be unreasonable for XOOM to target a
- 23 higher margin on its variable rates than it does on its
- 24 fixed rates?

Page 97

their retail business. Q. Okay. Well, I guess A. For example, a bunch of the Texas companies have retail supply businessess. We did a little bit on that, but not a major thing. But a bunch of the Texas companies had retail supply businesses. We did a little bit on that, but not a major thing. But a bunch of the Texas companies had retail supply businesses. We did a little bit on that, but not a major thing. But a bunch of the Texas companies had retail supply businesses. We did a little bit on that, but not a major thing. But a bunch of the Texas companies had retail supply businesses. We did a little bit on that, but not a major thing. But a bunch of the Texas companies had retail supply businesses. We did a little bit on that, but not a major thing. But a bunch of the Texas companies had retail supply businesses. We did a little bit on that, but not a major thing. But a bunch of the Texas companies had retail supply businesses. We did a little bit on that, and the major thing. But a bunch of the Texas companies had retail supply businesses. We did a little bit on that, and the major thing. But a bunch of the Texas companies had retail supply businesses. We did a little bit on that, and the major thing. But a bunch of the Texas companies had retail supply businesses whith a little bunch of the Texas companies had retail supply businesses. At a little bunch of the Texas companies had retail supply businesses. At a little bunch of the Texas companies had retail supply businesses. At a little bunch of the Texas companies had retail supply businesses. At a little bunch of the texas of the texas of the fixed rate and variable rate were profitable. Bot fixed rate and variable rate were profitable of the Texas companies had retail supply businesses. At a list had of the form sand that the bunch of the fixed rate and variable rate were profitable of the texas of the texas of the fixed rate and variable rate were profitable of the texas of the fixed rate and variable rate were profitable of the fixed rate and varia			_	
A. For example, a bunch of the Texas companies have retail supply businesses. We did a little bit on that, but not a major thing. But a bunch of the Texas companies had retail supply businesses that also had substantial other businesses. 6 companies had retail supply businesses that also had substantial other businesses. 9 Q. I think I understand what you're saying. And you owreke for the other side of their businesses, you worked for the other side of their businesses, you worked for the other side of their businesses? 10 A. Or sometimes we would be hired on some kind of protty broad. 11 Q. Goft it. Okay. I thank you for your time and your patience with me. 12 Q. Got it. Okay. I thank you for your time and your patience with me. 13 MR. MATTHEWS: Thanks very much. 14 A. Thank you. 15 Q. Yes, sir. 16 Electronic only. PDF exhibits. 17 A. Thank you. 18 Q. Yes, sir. 19 Q. Wh. Adamson, I just really have one question for you. You were asked by counsel for XOOM about whether 24 question. 21 BY MR. WITTELS: 22 BY MR. WITTELS: 23 Q. Mr. Adamson, I just really have one question for you. You were asked by counsel for XOOM about whether 4 question. 3 A. Yeah. Not in exact wording, but I remember the question of whether XOOM. 4 A. Yeah. And did you ask me to, whether you could go back and review your report when we had a break? 5 A. Yesh. And did you ask me to, whether you could go back and review your report when we had a break? 6 Q. And does that answer the question of whether XOOM. 11 made money and was profitable on its fixed rate customers? 12 CERTIFICATE 23 COMMONWEALTH OF MASSACHUSETTS 24 VINEDIAL THEMS: Place has a profitable on its fixed rate customers? 25 Q. And does that answer the question of whether XOOM. 26 D. And does that answer the question of whether XOOM. 27 A. Yesh. 28 Q. And did you reread paragraph 57? 29 A. Yes. 20 Q. And does that answer the question of whether XOOM. 21 Thinks. 22 A. Yesh. And I did you ask me to, whether you could go back and review your report when w	1	their retail business.	1	XOOM or some broad question.
4 retail supply businesses. We did a little bit on that, 5 but not a major thing. But a bunch of the Texas companies had retail supply businesses that also had 7 substantial other businesses. 8 Q. I think I understand what you're saying. And you 9 didn't work for the retail side of their businesses, you 10 worked for the other side of their businesses, you 11 A. Or sometimes we would be hired on some kind of 12 corporate strategy type engagement, which might be 13 pretty broad. 14 Q. Got it. Okay. I thank you for your time and 15 your patience with me. 16 MR. MATTHEWS: I'll pass the witness. 17 A. Thank you. 18 Q. Yes, sir. 19 EXAMINATION 18 Q. Yes, sir. 19 EXAMINATION 20 EXAMINATION 21 EXAMINATION 21 EXAMINATION 22 BY MR. WITTELS: 23 Q. Mr. Adamson, I just really have one question for 24 you. You were asked by counsel for XOOM about whether you could 25 go back and review your report when we had a break? 26 A. Yeah. Not in exact wording, but I remember the question. 36 Q. Oy Pah. And did you ask me to, whether you could go back and review your report when we had a break? 37 A. Yeah. Not in exact wording, but I remember the question of whether XOOM. 38 A. Yeah. Not in exact wording, but I remember the question. 39 Q. And did you are made profits on its fixed rate customers? 30 Q. And did you reread paragraph 57? 31 A. Yeah. Well, just – if just reminded me there was a a – I had said that there was not a specific PEL, his was a reference in the report to deposition testimony from a XOOM winess about the profitability of this. 30 Q. And what did your report find and state? 31 A. I don't remember exactly how he worded it. I think there had been a, in the deposition there was a question about, it was around, I don't have the current profits of the deposition that we had been a, in the deposition there was a question about, it was around, I don't have the current profits and the was a different profits and the profitability of this. 31 A. I han't remember exactly how he worded it. I think there had been a, in the de	2	Q. Okay. Well, I guess	2	Q. And the answer was?
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